No. 5914

IN THE

# United States
# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of Beverlyridge Company, et al., bankrupt; George H. Oswald and Richard Castle,

*Appellants,*

*vs.*

John Beyer,

*Appellee.*

## BRIEF OF APPELLEE.

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## BRIEF OF APPELLEE.

As stated in appellants' brief, by stipulation the cases of George H. Oswald and Richard Castle have been consolidated and are to be presented in one brief. These are both claims against a bankrupt which will be known in this brief as the Beverlyridge Company, which was a copartnership consisting of six (6) individuals.

For convenience the appellee will take up the cases separately in this brief.

### Statement of Facts in the Case of Richard Castle.

Attorney for the appellee feels that in presenting the facts of this case, he cannot do better than quote the opinion of the Referee in Bankruptcy on the claim of Richard Castle:

"On November 5th, 1925, Charles Stone, as the managing director of the bankrupt wrote the claimant Richard Castle stating:

'In connection with your efforts on our behalf in obtaining contract for us with Oswald Brothers—We herewith beg to state that when this deal is completed, we shall deed to you $25,000 worth of property in Beverlyridge. It is understood that you are to pay the release price on the lots which runs between $1500 and $1600.' [Printed Transcript of Record, page 84.]

"On December 14th, 1925, the bankrupt, by Charles Stone as trustee, executed a document, the original of which has been filed herein as Claimant's Exhibit 1. [Printed Transcript of Record 81-82.] This document, after identifying the parties, proceeds as follows:

'Party of the first part, in consideration of a valuable sum in dollars to him in hand paid, receipt of which is hereby acknowledged, does hereby covenant and agree to convey to party of the second part the following real property' etc.

Thereafter a certain tract of land stipulated to contain 31,850 square feet in the Beverlyridge Tract was described. The document ends with the two following provisions:

'It is further understood and agreed that as soon as party of the first part shall have caused to be duly approved and recorded in the office of said Recorder a map or plat of the Tract which contains the above described premises, party of the second part shall quitclaim and reconvey said premises by the same description to party of the first part and party of the first part shall immediately thereupon convey to party of the second part, subject to the uniform restrictions to be incorporated in all conveyances of lots in said proposed tract, the premises hereinabove described by their proper lot and tract numbers.

It is further understood and agreed that at the time of such conveyance party of the second part

shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain Deeds of Trust, each of which is now a blanket lien on the within described premises and other property.'

Claimant Richard Castle testified that the plat that was shown him divided the piece of property described by metes and bounds in the agreement into three lots. At no time did he offer to pay or tender to anyone the release price of either $1500 or $1600 per lot. [Printed Transcript of Record, page 97.] Approximately five months after the execution of the so-called agreement to convey (Claimant's Exhibit 1) a trust deed which was in existence on the property at the time of the execution of the letter of November 5th (Claimant's Exhibit 2) and the agreement of December 14th, was foreclosed, thereby eliminating any claims that this claimant might have in the real property. [Printed Transcript of Record, page 101.] This claimant at all times had knowledge of the financial condition of the bankrupt, and in fact part of his claim includes the sum of $880.00 which he loaned to the bankrupt to pay salaries. He also knew of the existence of the encumbrances on the real property of the bankrupt. [Printed Transcript of Record, page 99.]

The trustee contends first that there was no consideration for the agreement of December 14th, 1925, agreeing to convey the real property to the bankrupt, by reason of the fact that first, the services purported to have been performed by the claimant in securing the execution by George H. Oswald of an agreement with the bankrupt for the making of certain improvements on its real property, were not complete, because of the fact that all the members of the bankrupt copartnership, and their wives, the property being community real property, did not sign the agreement with Oswald. [Printed Transcript of Record, pages 89 to 91, inclusive, and pages 120-121.] Claimant however proved that Oswald executed the agreement, yet it is unquestionably true that in the absence of

its execution by all of the parties thereto he could consider it void as to himself, and in fact did so treat it later. [See printed Transcript—Letters of Blair and Stone—pp. 111-113.] Eliminating from consideration the question of whether or not the form of agreement was satisfactory to all the members of the bankrupt, not having been signed by all of them and some of them not being present as witnesses to testify concerning its contents, it was signed by Oswald and some of the bankrupts. Under a trust agreement executed by the various members of the bankrupt firm, Charles Stone was appointed trustee with authority to make certain contracts upon the bankrupt's behalf. It was urged that the bankrupt or its trustee can not take advantage of the failure of some of its members to sign the agreement after having authorized its trustee to perform certain acts upon its part, still the authorization was not complete because it concerned community real property and the trust agreement was itself not signed by the wives of all the parties.

There are, however, two more important questions, either of which require the disallowance of this claim. It will be noted that the letter of November 5th contains the clause, 'We herewith beg to state that when this deal is completed'. The "deal" to which the parties had reference was the construction of the improvements on the tract of land in order that it might be sold to the public. While it is true that, to a certain extent, the bankrupt recognized the procuring of the execution of the contract by Oswald as in some measure performing the services agreed to be rendered by him, which recognition is proved by the execution of the agreement of December 14th, 1925, yet this latter agreement is not an actual conveyance but only an agreement to convey. No time limit is set forth as to when the property shall be conveyed but at the conclusion of the agreement we find the two clauses above quoted requiring reconveyances after the approval and recordation of the map of the tract and requiring the claimant at such time to pay the release price to free the property from

the lien of the trust deeds with which it was encumbered. It is therefore clear that it was the intention of the parties that the claimant, Richard Castle, should not be entitled to the property involved until the whole "deal" had been completed, which would require the installation of the improvements, the recordation of the map and the property ready for sale to the public. This stage in the proceedings was never reached, and it was the contention of counsel at the hearing that the agreement of December 14th was in effect a conveyance by the bankrupt to the claimant, Richard Castle, and Castle would be guilty of laches, having with knowledge of the insolvent condition of the bankrupt and the existence of the encumbrances on the property, failed to tender to the trustee under the trust deeds the consideration as set forth in the letter of November 5th, 1925, for which he could have secured a release of the property described, thus permitting his interest to be forfeited by a foreclosure of the trust deed. Oswald refused to comply with his agreement and the bankrupt has received nothing of value by reason of the services rendered by Richard Castle, whose claim should be disallowed."

## ARGUMENT.

The terms of bankrupt's offer, as shown by claimant's "Exhibit 1" [printed Transcript of Record, pages 81-83, inclusive] and "Exhibit 2" [printed Transcript of Record, page 84], were as follows:

*First:* That the claimant should secure for the bankrupt a certain contract with the Oswald Brothers;

*Second:* That the claimant should pay the release price of certain lots in the Beverlyridge section; for which consideration

*Third:* The bankrupt agreed to convey to the claimant the said lots.

In support of bankrupt's contention that the release price was to be paid by Castle before conveyance of the property to him, we quote from claimant's "Exhibit 2":

> "It is understood that you (Castle) are to pay the release price on the lots which runs between $1500 and $1600."

and from the claimant's "Exhibit 1" (agreement to convey real estate), in the second paragraph after the legal description of the property:

> "It is further understood and agreed that at the time of such conveyance, party of the second part shall pay and discharge the full release price necessary to secure partial reconveyance of said lots by the trustee under two certain deeds of trust, each of which is now a blanket lien on the within described premises and other property";

These understandings and agreements clearly show that the paying of the release price by the claimant was one of the terms upon which the bankrupt's offer was made.

Admitting that the claimant did secure for the bankrupt the said contract (which fact is doubtful) the claimant did not pay the release price on the lots he claims to be due him. For this reason he cannot demand that the bankrupt execute its promise the consideration for which was both the contract and the payment of the price.

Partial performance of the terms of an offer does not bind the promisor.

The offeror is bound by his offer only where the offeree fulfills each and all of the terms of the offer. Part performance is not enough.

6 Cal. Jur., page 424:

> "PARTIAL PERFORMANCE: Generally speaking, partial performance of an entire or indivisible contract by one of the parties does not warrant a recovery against the other. Until performance is completed there is in such case no obligation to pay. Full and substantial performance is a condition precedent to the right to maintain an action."

Krumb v. Campbell, 102 Cal. 370;

Carlson v. Sheehan, 157 Cal. 692;

Kurales v. L. A. C. Co., 36 Cal. App. 171.

The claimant in seeking to avail himself of the bankrupt's offer, was bound to use reasonable diligence in taking advantage thereof, and in complying with the terms of the offer.

This he failed to do, for knowing that the property promised was subject to a trust deed, he did not, within the four months, pay the release price. It being common knowledge that trust deeds are foreclosable, and it being within the claimant's knowledge that the property was subject to such deeds, and that the Beverlyridge Company was not in any substantial financial condition, the delay on the part of the claimant is such as would estop him from claiming an unconditional acceptance of the bankrupt's offer.

The trustee submits that the contract is complete on its face, and that such contract conveyed to Castle by metes and bounds all the equity of title which the bankrupt company had in the property so conveyed, and therefore Castle, and not the Beverlyridge Company, was responsible for any mortgage or encumbrance thereon.

> "The acceptance of a conveyance, containing a statement that the grantee is to pay off an incumb-

rance, binds him as effectually as though the deed had been inter partes, and had been executed by both grantor and grantee."

Note citing cases under O'Connor v. O'Connor, 7 L. R. A. p. 34.

"Notwithstanding the trust, the trustor may devise or transfer the property subject to the trust. (Civil Code, Sec. 864.) And the devisee, or grantee acquires a legal estate against all persons except the trustees and persons lawfully claiming under them. (Civil Code, Sec. 865.)"

Sacramento Bank v. Alcorn, 121 Cal. 379 at p. 383.

"When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor."

Wood v. Goodfellow, 43 Cal. 185 at p. 189.

"It has been repeatedly determined that where a person buys land absolutely for a stipulated price, and, instead of paying the whole of it to the grantor, is allowed to retain a part, which he agrees to pay to a creditor of the grantor having a lien upon the land, the amount which he thus agreed to pay is his own debt, and although the arrangement does not discharge the grantor from liability to the lien creditor, who is no party to it, yet, as between the grantor and the grantee who has thus assumed the debt, the grantor is a mere surety."

Snyder v. Summers, 27 American Reports, p. 783.

## LACHES.

The claimant knew that there were trust deeds upon the property which included the lots he had purchased from the Beverlyridge Company. He was bound to know that these trust deeds might be foreclosed, and that if

they were foreclosed before he had paid the release price of the property his lots would be foreclosed under the blanket trust deed. He had from the 14th day of December, 1925, until the 24th day of April, 1926, to release his lots by tender of the purchase price. He failed to do so, and his failure was the direct cause of his loss of the property. The Beverlyridge Company had paid him in full for his services when they executed the contract transferring their equity in the lots in question to Castle. They would not give him a deed, because the only person who could give him a deed was the trustee in whose name the lots were held.

The Beverlyridge Company was not bound to keep the trust deed alive beyond a reasonable period, because Castle could pay the release price at any time and thus release his lots.

That Castle could be deliberately guilty of laches and then hold the Beverlyridge Company for a sum equal to his commission is against all principles of equity.

Laches is defined as:

> "Such neglect or omission to assert a right as, taken in conjunction with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."
>
> 10 Cal. Jur. 520.

> "In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question *whether the rights of the defendant, or of other persons, have been prejudiced by such delay.* (Citing cases.)
>
> * * * * * * * * *

The defense of laches is different from the defense of the statute of limitations in this, that in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed."

Cahill v. Superior Court, 145 Cal. 42, at pp. 46-47.

"Equity will not relieve against culpable negligence or inexcusable laches. Ignorance of the alleged fraud will not excuse appellant's laches, especially as her ignorance may be traced directly to her."

Tynan v. Kerns, 119 Cal. 447 at p. 451.

"It is a familiar doctrine of laches, apart from any question of statutory limitation, that courts of equity will discourage laches and delay in the enforcement of rights, and the general rule is that nothing can call forth the court of chancery into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. (10 R. C. L. 395.)"

Gravelly Ford Co. v. Pope-Talbot Co., 36 Cal. App. 717 at p. 737.

"Laches is a question of fact, on the evidence, *and* each case becomes largely a law unto itself."

10 Cal. Jur. 527.

See also Wolff & Co. v. Canadian Pac. Ry. Co., 123 Cal. 535, at p. 540.

"Notice: Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Civil Code, Sec. 19;

22 Fed. 765, 768.

"A person is in equity guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby he might be injured should he be allowed to enforce his rights."

10 Cal. Jur. 531.

"It is also a well recognized principle that 'A person is, in equity, guilty of laches such as to preclude him from obtaining relief, only when he has, by his own conduct or negligence and delay, induced or suffered another to do something or abstain from doing something, whereby the latter might be injured, if the person guilty of such delay should be allowed to enforce his rights notwithstanding the negligence and delay. The doctrine was never intended to protect the fraudulent, but to shield the innocent.'

In determining what will constitute such unreasonable delay regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or any other person, have been prejudiced by such delay."

Taber v. Bailey, 22 Cal. App. 617 at page 623;

See also American Emigrant Co. v. Call, 22 Fed. 765 at p. 768.

## Statement in Regard to the Claim of George Oswald.

Attorney for the trustee cannot do better, as a statement of facts, than to copy from the referee's opinion on the claim of George Oswald as given in the printed Transcript of record, pages 55-58 inclusive, as follows:

"This agreement is evidenced herein as claimant's Exhibit 3, and provides for the doing of certain improvement work upon the tract of land owned by the bankrupt at a cost of approximately $500,000.00. The parties of the first part in the agreement are Charles Stone, trustee, Charles Stone and Clara F.

Stone, his wife, F. A. Arbuckle and Ernestine C. Arbuckle, his wife, John M. Pratt and Dorothy D. Pratt, his wife, James Westervelt and Mary C. Westervelt, his wife, and I. W. Norcross, an unmarried man, the claimant George H. Oswald being the party of the second part. The agreement was signed by Charles Stone, trustee, Charles Stone, F. A. Arbuckle by Charles Stone, attorney in fact, John M. Pratt by Charles Stone, attorney in fact, I. W. Norcross by Charles Stone, attorney in fact and James Westervelt as parties of the first part and George H. Oswald. It appeared from the evidence that all of the parties of the first part except Norcross were married at the time of the execution of the agreement and by the testimony of Stone that his interest in the property was community property. [See printed Transcript of Record, pp. 120-121, and Exhibit 3, pp. 84-85.] Arbuckle, Pratt and Norcross by a certain power of attorney filed with the trust executed in the matter, authorized Charles Stone to execute agreements of this character upon their behalf. No evidence was introduced empowering Charles Stone to sign the agreement upon behalf of the wives of the various parties, and in fact, he does not even purport to so sign. There are two questions involved, first, whether or not the wives of the parties of the first part are necessary parties to the agreement, without whose signatures the party of the second part could not be bound, and second, whether the claimant, George H. Oswald, refused to consider the agreement in effect without the signatures of these parties. Without regard to the wives of the other parties, it is clear that Clara F. Stone was the wife of Charles Stone at the time of the execution of the agreement and at the time the real property was acquired and that the property was community property, and that she had not executed the agreement. Under section 172 A of the Civil Code of this state an agreement for the transferring or encumbering of any interest in real community property is void unless signed by both spouses. Paragraph 13 of the agreement purports to transfer and assign to the claimant all the right, title and interest

of the bankrupt as security for the performance of the terms of the agreement upon their part.

Furthermore, the agreement appears to be one provided to be executed by certain parties. The elimination of one or more parties from the agreement without the consent of the other party would constitute a material alteration rendering it void. It is clear from the evidence that the claimant, George H. Oswald, did not consent to the alteration of the agreement or waive the signatures of the wives of the various parties. On December 31st, 1925, Mr. Oswald's attorney wrote Mr. Stone as follows:

> "Mr. George Oswald has requested that I communicate with you in regard to the following matters:
>
> If you have secured the signatures of the parties of the first part to your contract with George H. Oswald, will you kindly forward the same to me.
>
> Will you also kindly forward the plans and profiles, and obtain the permits necessary to do the work and forward copies of the same to me, so that I can immediately take the matter up with Mr. Oswald." [Printed Transcript of Record, p. 111.]

On January 5th, 1926, Charles Stone wrote Mr. Blair, the claimant's attorney, as follows:

> "Your letter of Dec. 31st with reference to the Oswald improvement contract, received.
>
> We have obtained the signatures of all of the parties to the contract with the exception of one, which will necessitate a trip to Santa Monica on the part of the writer and this will be done at the first possible moment.
>
> The contract which we are to deliver to you will supplant the original contract which was signed by the writer under a trust agreement and power of attorney for all the partners of the Beverly-Ridge Company" * * * [Printed Transcript of Record, pp. 111-112.]

While the above communication refers to the signatures of the parties having been obtained to a contract, yet no evidence was introduced showing its execution and delivery. Furthermore, had this new contract been delivered, it is apparent from the letter of January 5th that it was a different agreement than that of November 19, 1925. On January 23rd Mr. Blair wrote the bankrupt as follows:

> "On December 21st I wrote you and inquired if you had secured the signature of the parties of the first part to your contract with George H. Oswald. A few days later, I saw you at Mr. Castle's and you stated that you expected to have all the signatures within a day or two. As yet, I have not received the contract.
>
> Mr. Oswald has informed me that the plans and profiles and necessary permits to do the work have not been forwarded to him.
>
> I would like to call your attention to the fact that Mr. Oswald is contemplating the undertaking of other large contracts in the near future, and as a result would like to know if the above matters have been taken care of, and if not when they will be. Mr. Oswald feels that if this matter is not taken care of within the next few days, he will have to refuse to accept the contract." [Printed Transcript of Record, pp. 112-113.]

It clearly appears that the claimant Oswald did not consent to the acceptance of the contract without the signature of all the parties named therein, and did in fact refuse to consider it in force and proceed with the work. While it is undoubtedly true that he had an additional reason, that the plans and profiles had not been filed with the proper authorities nor the necessary permits issued to enable him to proceed with the work according to law, yet the contract never became effective because of the absence of the signatures of all of its parties. No work was done by Mr. Oswald under the contract, and the bankrupt received nothing of value from him. His claim is for profits he alleges would have accrued to him had he completed the contract."

# ARGUMENT.

## I.

In reply to George Oswald's claim for damages to the extent of $152,000 alleged to have been suffered by reason of breach of contract, the trustee submits that the property on which negotiations were pending was community property and that any contract in relation thereto, to be valid, had to be signed by the wives of the signatories as well as by signatories themselves, and that without the said signatures of the said wives, no agreement concerning the Beverlyridge Tract was binding as a contract. Furthermore, the claimant knew and acknowledged this fact by his demand that such signatures be obtained before he commenced to fulfill his part of the agreement. The said wives never having signed the said agreement, it was not, therefore, a valid contract.

## II.

If, however, the court finds that Oswald did have a valid contract with the Beverlyridge Company, contrary to the above contention, then the trustee submits that Oswald, by letters, through his attorney, of December 21, 1926, and January, 1927, being Trustee's Exhibit A, [Printed Transcript of Record, pp. 111-112-113], said that he did not and would not consider the contract binding and would not act thereunder unless the parties' wives joined with their husbands and signed the contract. Trustee hereby submits that these letters were a repudiation of the contract and that the Beverlyridge Company could either have sued for specific performance, or assent to the repudiation by Oswald and thus rescind the contract.

The Trustee further submits that by the conduct of the members of the Beverlyridge Company in not getting their wives to sign, they assented to the repudiation and thus the contract was rescinded and, in support of the proposition that a rescission by the consent of the parties may be implied from their conduct, and that their conduct in this case was sufficient to effect a rescission, we cite the following authorities:

> "A rescission by consent may be implied from the acts of the parties. The giving of notice and the conduct of the parties thereafter may amount to rescission by their mutual consent. Moreover, where a rescission on the part of one party is implied by his refusal to comply with the contract, and the other party acquiesces therein, a rescission by consent is effected, as provided by the Civil Code."
>
> 6 Cal. Jur. Sec. 230 at page 383.

> "The contract was to build a house. The plaintiffs abandoned the contract, and made no efforts to continue the erection of the house. The defendants some time after the abandonment by the plaintiffs, sold the lot and the remains of the building, and thus put it out of their power to require the performance of the contract on the part of the plaintiff. It seems to me, that if an execution of the agreement to rescind cannot be presumed from these circumstances, it would be hard to put a case in which it could."
>
> Green v. Wells & Co., 2 Cal. 584 at p. 585.

In Carter v. Fox, 11 Cal. App. 67, the defendant refused to sell land to the plaintiff in accordance with a written contract. The plaintiff brought suit to recover money already paid for the land which the defendant refused to convey. The defendant then claimed there was a contract and that the plaintiff was guilty of a breach. But the

court held that the contract had by the acts of the parties been rescinded. Said the court:

> "Moreover, we are of the opinion that the facts alleged in the complaint and admitted or found by the court to be true constituted a rescission under subdivision 5 of section 1689 of the Civil Code. When defendant refused to perform the covenants of the contract on his part, and plaintiff, instead of asserting his rights thereunder, acquiesced in and assented to such repudiation and demanded the return of the money paid, such facts were sufficient to constitute a rescission of the contract by consent of the parties."
>
> Carter v. Fox, 11 Cal. App. at pp. 72-73.
>
> "When defendants, without performance of their promise, in the absence of which no duty was imposed upon the plaintiff to pay the note, demanded the return of the truck and plaintiff complied therewith, a rescission by consent was implied from such acts."
>
> Hogan v. Anthony, 40 Cal. App. 679 at p. 684.
>
> "There can be no question that a contract can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof; that it may be done by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties."
>
> Thompkins v. Davidow, 27 Cal. App. 327 at p. 335.
>
> "In Billou v. Billings, 136 Mass. 307 the plaintiff had partly performed, by paying some money to the defendant, when the defendant repudiated the contract. The plaintiff assented to the repudiation, and demanded the return of money paid. The defendant then contended that as the time had not come for him to act, his words did not constitute sufficient grounds for a rescission by the plaintiff. The court said, (p. 308) 'Such a repudiation did more than

excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end. It had this effect, even for want of a tender, the time for performance of the defendant's part had not come, and therefore it did not amount to a breach of contract."

13 Cal. Jur. 615, section 667, note 85.

"While the refusal justifying rescission must be absolute and unconditional, it may be couched in hypothetical terms. Citing 13 Man. 590, where it was held that the refusal of a person buying a quantity of goods to take any more goods 'unless you make the first car right' was sufficient to show an intention not to be bound by the contract."

It is respectfully submitted by the Trustee in Bankruptcy that under the facts of these claims, as set forth in the printed Transcript of Record and under the law set forth herein, that the findings of the Referee affirmed by the District Court of the United States, in and for the Southern District of California, Southern Division, should be affirmed.

Respectfully submitted,

Lorrin Andrews,

*Attorney for the Trustee in Bankrupty.*